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Supreme Court of the United States

No. 707 October Term, 1940

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THE CITY OF NEW YORK,
Petitioner,
against
THE UNITED STATES OF AMERICA and WAYNE C. TRACE as assignee for the Benefit of Creditors of Long Island Sash & Door Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

Application of U. S. R. S. § 3466 to claims arising out of operations of Federal Housing Administrator. Whether principles of *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, and *United States* v. *Marxen*, 307 U. S. 200, should not have led to denial of priority, as dissenting Judge below thought.

January 18, 1941.

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INDEX

PAGE

Petition:

Jurisdiction and Timeliness 2
Statutes Involved 4
Opinions Below 7
Summary Statement of the Matter Involved 7
Question Presented 8
Assignment of Errors 8
Reasons for Allowance of Writ 8

Brief:

Statement of Case 11

Argument

1. Priority under § 3466 should be denied where, because of the commercial character of the transaction giving rise to the claim, an award of priority would be unjust 12

2. United States v. Guaranty Trust Co., 280 U. S. 478, is a precedent for inquiring into the purpose of the statute under which were carried on the operations giving rise to the claim; and the purpose of the statute there involved is sufficiently similar to that at bar to convict the Court below of error in refusing to follow it 14

3. The questions left open in United States v. Marxen, 307 U. S. 200, are present and determinative of the instant case. They are of public importance and certiorari should issue so that they may be answered 18

Conclusion 21

Appendix. Opinion of Appellate Division 22

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Table of Cases Cited.

PAGE

Commonwealth v. Phoenix Bank, 11 Metc. 129 13

Davis v. Pringle, 1 F. (2d) 860; 268 U. S. 315 13
Davis v. Pullen, 277 Fed. 650 12
Dickinson's Estate, 197 Wash. 145, 84 Pac. (2d) 661 9
Director General v. Kastenbaum, 263 U. S. 25 12
DuPont de Nemours & Co. v. Davis, 264 U. S. 456 20

Federal Housing Administration v. Burr, 309 U. S. 242 ..... 15, 16

Graves v. Elliott, 307 U. S. 383 9

Howe v. Sheppard, Fed. Cas. 6772 23

Industrial Accid. Comm. of Calif. v. Davis, 259 U. S. 182 2

Keifer & Keifer v. R. F. C., 306 U. S. 381 15
Korman v. Federal Housing Administration, 113 F. (2d) 743 ..... 9, 20, 23

Lewis v. U. S., 92 U. S. 618 23

Matter of Atlas Television Co., 273 N. Y. 51 7
Matter of Wilson, 23 F. Supp. 236 23
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 4
Mellon v. Michigan Trust Co., 271 U. S. 236 ..... 12, 19, 20

New York City v. Goldstein, 299 U. S. 522 7

Sloan Shipyards Corp. v. U. S. Shipping Bd. E. F. Corp., 258 U. S. 549 ..... 13, 19
State Industrial Comm. of N. Y. v. Nordenholt Corp., 259 U. S. 263 2

United States v. Fisher, 2 Cranch 358 23
United States v. Guaranty Trust Co., 290 U. S. 478 ..... 2, 4, 8, 9, 14, 17, 19, 21
United States v. Marxen, 307 U. S. 200 ..... 2, 4, 5, 8, 16, 18
United States v. State Bank of North Carolina, 6 Pet. 29 12

Wagner v. McDonald, 96 F. (2d) 273 ..... 9, 23
Wisconsin v. J. C. Penney Co., 311 U. S. 2, 9

Other Authorities.

PAGE

Acts of Congress

Judicial Code 9
National Bankruptcy Act 18
40 Stat. 451 ..... 13, 19
41 Stat. 456 ..... 8, 17
48 Stat. 1246 (Nat. Housing Act) 5, 9, 14, 19, 21
49 Stat. 293 5
49 Stat. 684 ..... 5, 15
49 Stat. 1187 ..... 5, 15
49 Stat. 1232 ..... 5, 16
49 Stat. 1648 5
50 Stat. 20 5
50 Stat. 70 5
53 Stat. 804 5
U. S. R. S. § 3466 ..... 2, 4, 6, 7, 8, 9, 11, 12, 15 16, 18, 20, 21, 23

Congressional Record 14, 15

New York Laws 1934, ch. 873 4
DuPont de Nemours v. U. S., 264 U. S. 456 20
Industrial Comm. of Calif. v. Davis, 259 U. S. 182 2

Supreme Court of the United States

No. . October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA and WAYNE C. TRACE as assignee for the Benefit of Creditors of Long Island Sash & Door Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. In a certain proceeding in the Supreme Court of the State of New York, Queens County, known as *In the Matter of the General Assignment for the Benefit of Creditors of Long Island Sash & Door Corporation,* claims were duly filed by the United States of America and by your petitioner, as well as by other persons whose interests are, however, of no present relevance. The respondent Trace is the assignee of the debtor corporation.

3. The claim of the City of New York was allowed in the sum of $1200. Of this sum $1000 represented a claim for sales taxes imposed under one of the City's emergency relief local laws, while $200 represented a claim for business

taxes imposed under another of these local laws. The claim of the United States of America arose out of the activities of the Federal Housing Administrator who had insured certain notes given to a bank by the insolvent and who prior to the general assignment for benefit of creditors had caused the bank to assign the notes to the United States. This claim was allowed in the sum of $1,042.40.

4. On November 26, 1940, after proceedings duly had according to law, the Court of Appeals of the State of New York (being the highest Court of the State) affirmed an order of the Appellate Division of the Supreme Court, Second Department, the effect of which was to award the United States of America priority over the City of New York. One of the Judges of the Court of Appeals (CONWAY, J.) dissented on the authority of *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, and *United States* v. *Marxen*, 307 U. S. 200.

5. On January 7, 1941, the Court of Appeals amended its remittitur to show that its decision rested on federal grounds alone, *i. e.*, that U. S. R. S. § 3466 (U. S. Code, tit. 31, § 191) compelled them to hold as they did. See par. 11, *post*.

Jurisdiction and Timeliness.

6. The petition is made under U. S. Code tit. 28, § 344, subd. (b), and the Court has jurisdiction to grant the writ. *Industrial Accident Commission of California* v. *Davis*, 259 U. S. 182 (1922); *State Industrial Comm. of N. Y.* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. (Dec. 16, 1940).

7. The decision of the Court of Appeals was handed down November 26, 1940 (284 N. Y., mem. p. 145). The remittitur was amended January 7, 1941, and in its amended

form was filed in the office of the County Clerk of Queens County on or about January 15, 1941. The County Clerk is the Clerk of the Supreme Court of the State of New York, Queens County, and the amended remittitur is accordingly in the custody of the Supreme Court. A final order of the Supreme Court, Queens County, was entered upon the amended remittitur on January 15, 1941.

8. In the court of first instance, your petitioner prevailed, and on the settlement of the final account of the assignee, payment to creditors out of the assets of the insolvent was ordered to be made in the following order (R., 7):

> "ORDERED, that out of the balance in the hands of the Assignee, amounting to the sum of $561.70, said Assignee be, and he is hereby directed to pay to himself the sum of $35.00, as and for his fees as Assignee, and the sum of $250.00 to Leon Epstein, as attorney, as and for the services rendered on behalf of the said Assignee, and it is further
>
> ORDERED, that the balance of the moneys then remaining in the hands of the Assignee, be and it hereby is directed to be distributed as follows: The sum of $18.73 to Lester Mendell & Co.*; the sum of $140.23 to the United States of America; and the balance to the City of New York, * * *."

9. In the Appellate Division, Second Department, an order of modification was entered, upon a *per curiam* opinion (reported in 259 App. Div. 688, reprinted *post*, p. 22), to the effect that instead of paying $140.23 to the United States and the balance to the City of New York, the assignee should hand over the balance to the United States.

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* This company was accorded priority because they had shipped goods to the insolvent on consignment to be sold by the insolvent as their agent.

10. The Court of Appeals affirmed without opinion but with the following memorandum:

> "Order affirmed, without costs. No opinion. All concur except Conway, J., dissents on the authority of *United States* v. *Guaranty Trust Co.*, 280 U. S., 478, and *United States* v. *Marxen*, 307 U. S., 200."

11. The amendment of the remittitur was accompanied by the following memorandum:

> "Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto after the words 'affirmed with costs', the following: 'upon the sole ground that the provisions of Section 3466 of the United States Revised Statutes create in the United States of America a priority superior to that enjoyed by the City of New York, and upon no other grounds.'"

Statutes Involved.

12. We are not concerned with the construction or with the constitutionality of any State or local laws, and their text, we assume, need not be set out *in extenso*. Suffice it to say that under the authority of an Enabling Act (New York Laws of 1934, ch. 873), the City, by local laws, imposed in 1934 (and thereafter renewed annually) a series of emergency taxes for the relief of unemployment. One of these local laws imposed a sales tax and has been familiar to this Court since the argument and decision last year of a group of cases of which the best known is *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The insolvent was found to be indebted to your petitioner in the sum of $1,000 on account of sales taxes. Another of these local laws imposed a tax for the privilege of carrying on in the City of New York any

trade, profession or commercial activity (with exceptions not here pertinent), and the insolvent was found to be indebted to your petitioner in the sum of $200 on account of these so-called business taxes. The United States of America does not object to the allowance of the City's claims but merely asserts its own greater priority over the City.

13. The United States of America was empowered by the National Housing Act (48 Stat. 1246), as amended * to insure banks and other institutions

> "against losses which they may sustain as a result of loans and advances of credit and purchases of obligations representing loans and advances of credit, made by them subsequent to the date of enactment of this Act and prior to January 1, 1936, or such earlier date as the President may fix by proclamation, for the purpose of financing alterations, repairs, and improvements upon real property."

14. The proofs of claim alleged that the National City Bank of New York was the holder of two promissory notes executed by the assignor (R., 24-25 and 33-35), the amounts of which represented loans and advances of credit by the National City Bank to the assignor for the purpose of financing alterations, repairs, improvements and additions upon real property, and the purchase and installation of equipment and of machinery on real property (R., 20, 29); that the National City Bank applied for and obtained from the Federal Housing Administrator insurance against

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* Amended in respects of only slight materiality for present purposes by 49 Stat. 293; 49 Stat. 684, §§ 208, 308 and 344; 49 Stat. 1187; 49 Stat. 1232; 49 Stat. 1648, §§ 14 and 26; 50 Stat. 20; 50 Stat. 70; 53 Stat. 804. Certain of the amendments are analyzed in *United States* v. *Marxen*, 307 U. S. 200, 203 (1939).

losses which it might sustain as a result of loans and advances of credit for the purposes just mentioned; that at a time when $339.48 was due on one note and $800.04 was due on the other (R., 22, 31), the assignor defaulted in its obligations, so that, the notes having been assigned by the National City Bank to the United States of America, the United States became a creditor of the Long Island Sash & Door Corporation in the net sums (after credit for partial payments) of $316.60 on one note and $725.80 on the other note (R., 23, 32).

15. The claims filed by the government then make reference to § 3466 of the United States Revised Statutes, which reads as follows:

> "§ 3466. **Priority Established.** Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

16. The contention was thereupon made (R., 23, 32) that the statute applied to debts arising under the National Housing Act, whenever the United States had taken assignments to protect itself from losses upon insured obligations.

Opinions Below.

17. The Appellate Division, Second Department, whose opinion is given in full in an Appendix, *post,* p. 22, awarded priority to the United States, stressing, in doing so, the circumstance that the debts were assigned to the United States prior to the insolvency. They said (R., 46):

> "In any event, the United States of America is entitled to priority upon these claims in view of the fact that the assignments of the claims and the notes given as security were made to the United States and were in its name at the time the borrower made the general assignment for the benefit of creditors. Under section 3466, the priority of payment does not depend upon how the United States acquired title to the notes, nor upon their status prior to the transfer."

18. The memoranda handed down by the Court of Appeals (no opinion being written) were set out *ante,* pars. 10 and 11.

Summary Statement of the Matter Involved.

19. Since, but for the superior priority awarded to the United States, the City would have been paid as a prior creditor ahead of general creditors under the decision in *Matter of Atlas Television Co.,* 273 N. Y. 51 (1936), cited and followed in *New York City* v. *Goldstein,* 299 U. S. 522 (1937), the basic question presented is whether U. S. R. S. § 3466 applies to claims which arise in the United States as a result of the operations of the Federal Housing Administrator. Your petitioner, as will more fully appear from the annexed brief, contends that it should not, since the purpose of the National Housing Act would be thereby defeated—it being manifest that no builders or supply men would ad-

vance funds to repair or erect buildings if on the insolvency of the person for whom the building was being erected or to whom the supplies were being furnished, these creditors would not participate in the estate save after the United States had been paid in full. Arguments along these lines have the sanction of this Court. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478 (1930), denying priority where the bases of the indebtedness were advances under the Transportation Act (41 Stat. 456), §§ 207-210.

Question Presented.

20. The question presented is: Does U. S. R. S. § 3466 apply to debts owing to the United States as a result of operations of the Federal Housing Administrator?

Assignment of Errors.

21. Your petitioner submits that the Court of Appeals erred in giving an affirmative answer to the foregoing question.

Reasons for Allowance of Writ.

22. The question whether priority is enjoyed by the United States as to claims residing in it as a result of the operations of the Federal Housing Administrator has never been passed upon by this Court. The existence of the question was acknowledged in *United States* v. *Marxen*, 307 U. S. 200 (1939), but the question was not squarely raised nor decided, since the assignment of the insured banks' claims to the United States in that case took place *after* the general assignment for benefit of creditors.

23. The foregoing question is of wide public importance since the Federal Housing Administrator carries on activities in every State in the Union. It is no exaggeration to say that it is involved in thousands of proceedings under state insolvency statutes. The affirmative answer to the question given below seems calculated to defeat the congressional intent to combat unemployment in the building industry, since it discourages builders and supply men from dealing with property owners whose notes to banks have been insured under the National Housing Act. And see par. 19, *supra*. That the element of public importance attaching to a case is a reason for granting certiorari was stated specifically in *Graves* v. *Elliott*, 307 U. S. 383, 386 (1939); *Wisconsin* v. *J. C. Penney Co.*, *ante*, p. 2.

24. The decision below, though in accord with cases in intermediate federal courts (*e. g.*, *Wagner* v. *McDonald*, 96 F. [2d] 273 [8th Circ., 1938] and *Korman* v. *Federal Housing Administration*, 113 F. [2d] 743 [App. D. C., 1940]) and with a Washington case (*In re Dickinson's Estate*, 197 Wash. 145, 84 Pac. [2d] 661 [1938]), seems in conflict with *United States* v. *Guaranty Trust Co.*, 280 U. S. 478 (1930). The law, therefore, is still unsettled, and the profession stands in need of a determination of the question in this Court.

25. There is no square decision in this Court, as far as counsel have been able to discover, awarding the United States priority under U. S. R. S. § 3466 where the claim exists in the United States by way of assignment from the original obligee. The authorities cited in the opinion of the Appellate Division, *post*, p. 23, are *dicta* merely.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New

York, in and for the County of Queens, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court, as provided in 28 U. S. C. A., § 344, subd. (b); and that the final order and determination of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and determination, awarding to the United States of America a priority superior to that of your petitioner, may be reversed; and your petitioner prays for such other and further relief as to this Court may seem just and proper, and your petitioner will ever pray.

New York, N. Y., January 18, 1941.

THE CITY OF NEW YORK,
Petitioner,

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